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No. 02-964

In the Supreme Court of the United States

GEORGE H. BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

Reese argues, as he must, that he fairly presented to Oregon's highest court a federal constitutional claim of ineffective assistance of appellate counsel, even though he cited no authority as the legal basis of his claim. Reese seizes on the State's acknowledgment that, in certain narrow circumstances, a state prisoner necessarily identifies a federal issue even without citing federal authority.[1] Expanding from this, Reese argues that a state prisoner can alert a State's highest court to the federal nature of his claim if (1) he phrases his claim in terms associated only with federal rather than state constitutional claims; or (2) the state courts apply the same legal analysis in deciding the claim under either the state or federal constitution; or (3) state law requires the state appellate court to address issues not actually presented by the petitioner. The State disagrees that a state prisoner would satisfy the fair presentation requirement by complying with Reese's second proposed option. Although Reese's first and third options *might* satisfy the fair presentation requirement in certain circumstances, those circumstances are not present in this case.

I. The phrase "ineffective assistance of counsel" is not a legal term of art that necessarily identifies a federal claim for the Oregon appellate courts; therefore, Reese did not alert the state courts that he was raising a federal claim.

Reese argues that he alerted the Oregon appellate courts to the federal nature of his claim by using the phrase "ineffective assistance of counsel." Brief of Respondent at 27–29. As the

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[1] The example the State gave was that a "due process claim" in Oregon courts would necessarily be a federal claim because the Oregon Constitution does not contain a due process clause.

State noted in its opening brief, Oregon courts often refer to "inadequate assistance of counsel" instead of "ineffective assistance of counsel" because the Oregon Supreme Court has stated that, under state constitutional principles, "the term 'adequate' assistance of counsel may be more accurate than 'effective' assistance of counsel." Brief of Petitioner at 4 n. 5 (*quoting Krummacher v. Gierloff*, 290 Or. 867, 872 n. 3, 627 P.2d 458, 462 n. 3 (1981)). Reese asserts that he fairly presented the federal nature of his claim to the state appellate courts because he "referred to his claim almost exclusively as a claim of 'ineffective,' not 'inadequate,' assistance."[2] Brief of Respondent at 29.

Although the Oregon Supreme Court may have expressed a preference for the phrase "inadequate assistance of counsel" under the state constitution, it has not transformed that phrase into a legal term of art nor does it treat the phrase "ineffective assistance of counsel" as denoting a claim arising only under the federal constitution. Rather, practitioners and judges alike

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[2] The Ninth Circuit recently took Reese's argument one step further. Although only the Oregon Supreme Court has expressed a preference for the use of the phrase "inadequate assistance of counsel" when referring to claims under the Oregon Constitution, the Ninth Circuit held that a state prisoner had fairly presented a federal claim to the *Washington* state courts because he "consistently and exclusively" mentioned ineffective assistance of counsel. *Sanders v. Ryder*, ___ F.3d ___, ___ (9th Cir. 2003) (2003 WL 22053440). Thus, the Ninth Circuit apparently believes "ineffective assistance of counsel" is a term of art designating a federal claim, not only for Oregon courts, but for all courts in that circuit. *Sanders* demonstrates the problems that inevitably arise each time courts are permitted to move away from a hard-and-fast rule that state prisoners must cite the federal constitutional provision or a leading federal case to establish that they fairly presented a federal claim to the state courts.

often use the phrases interchangeably. For example, in *Lichau v. Baldwin*, 166 Or. App. 411, 415, 999 P.2d 1207, 1210 (2000), the Oregon Court of Appeals wrote:

> Petitioner filed a petition for post-conviction relief alleging multiple grounds of trial court error, prosecutorial misconduct, and *inadequate* assistance of counsel. In support of the *ineffective* assistance of counsel claim, petitioner alleged that trial counsel failed to conduct an adequate investigation of his alibi defense.

(Emphasis added); *see also Hempel v. Palmateer*, 187 Or. App. 70, 75, 66 P.3d 513, 515 (2003) ("Petitioner's federal inadequate assistance claim fails for the same reasons that his state claim fails.").

Reese himself used the terms interchangeably before the state appellate courts.[3] Thus there simply is no support for Reese's argument that the Oregon appellate courts must have treated Reese's reference to "ineffective assistance of counsel" as necessarily raising a federal claim.

But even more troubling than Reese's unsupported description of Oregon law is the broader implication his rule would have for all federal habeas litigation. To hold that the exhaustion requirement is satisfied by referring to a claim "almost exclusively" in language that *may* constitute a term of art will increase litigation in federal habeas corpus proceedings on this issue and on other federal claims that have state-

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[3] Even before this Court, Reese does not treat the phrase "ineffective assistance of counsel" as a term of art reserved for the federal constitution. For example, see Brief of Respondent at 29; in the heading on that page, Reese uses the term "ineffective" when referring to both the state and federal constitutions.

court analogs. Whether a given word or phrase is a term of art for the state courts and whether a state prisoner who used that word or phrase almost—but not quite—exclusively fairly presented a federal claim to the state courts makes a guessing game of the federal habeas corpus proceedings. As the State pointed out in its opening brief, the potential for wasting resources litigating procedural default issues is a legitimate concern for this Court in explaining the requirements of exhaustion of state remedies through fair presentation of claims in the state courts. Rejecting Reese's novel "term of art" principle is one way to ensure a more efficient use of those limited resources.

II. Even if a state court applies the same legal analysis to similar claims raised under the state and federal constitutions, a state prisoner still must make it clear to the state court that he is raising a federal claim.

Reese argues that, because the state courts would have applied the same test for a claim of ineffective assistance of appellate counsel under either the Oregon or United States Constitutions, he should be deemed to have provided the state appellate courts with sufficient opportunity to consider a claim under the federal constitution. Brief of Respondent at 29–35. Effectively, Reese wants to benefit from his own failure to refer explicitly to either constitution.

There are at least four problems with Reese's argument. First, even when state courts analyze an issue under the state constitution in the same way they analyze a related issue under the federal constitution, it is critical first to identify for the state court the source of the claim because that source defines the authority of the state court. This is especially true for the state's highest appellate court, which is free to modify its analysis under the state constitution, but is bound by this Court's decisions concerning the federal constitution.

Thus, for example, even if the Oregon Supreme Court currently applies the same analytical process and standards for resolving state and federal claims of ineffective (or inadequate) assistance of appellate counsel, that may not always be the case. The Oregon Supreme Court frequently has diverged in its interpretation of the state constitution from this Court's interpretation of similar provisions under the federal constitution. *See, e.g., State v. Moore*, 334 Or. 328, 331, 49 P.3d 785, 787 (2002) (rejecting state's suggestion that the court reexamine and discard the "unavailability" requirement under Article I, section 11, of the Oregon constitution in light of changes in this Court's analysis of Confrontation Clause claims); *State v. Tanner*, 304 Or. 312, 315–316, 745 P.2d 757, 758–759 (1987) (rejecting federal analysis of exclusionary rule based on deterrence rationale; under the state constitution the exclusionary rule is predicated on an individual's privacy rights); *State v. Smith*, 301 Or 681, 725 P.2d 894 (1986) (right against compelled self-incrimination differs under state and federal constitutions). In fact, the Oregon Supreme Court recently has emphasized its willingness to reexamine any prior state constitutional decision when presented with a principled argument demonstrating that the challenged decision was inconsistent with the court's template for constitutional construction. *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 53–54, 11 P.3d 228, 237 (2000) (inviting parties to suggest new analyses); *Storm v. McClung*, 334 Or. 210, 222–223, 47 P.3d 476, 482 (2002) (reconsidering prior interpretation of Article I, section 10, of the Oregon constitution).

Although the Oregon appellate courts currently may follow the same analysis in addressing ineffective assistance of counsel claims brought under either the state or federal constitutions, they do not, as Reese suggests, simply merge the state claim into the federal claim. Nor do they treat the state claims as controlled by federal case law. Instead, when claims are raised under both constitutions, the state courts

raised under both constitutions, the state courts treat each claim separately and they analyze the state constitutional claims under the state constitution and the case law addressing the state constitution. *See, e.g., Lichau v. Baldwin*, 333 Or. 350, 358–359, 39 P.3d 851, 856 (2002) (following court's methodology of addressing claims under the state constitution before addressing similar claims under the federal constitution; the court expressly declined to reach the federal claim after first addressing the state claim); *Hempel v. Palmateer*, *supra*, 187 Or. App. at 73–75, 66 P.3d at 514–15 (2003) (same for claim of inadequate assistance of appellate counsel).

A second problem with Reese's argument is that it improperly shifts the focus away from what the state prisoner must do to alert the state courts to a federal claim and, instead, focuses on what the state courts may do even when the state prisoner fails to alert them to a federal claim. As the State discussed at some length in its opening brief, the Ninth Circuit similarly transformed the fair presentation requirement from an obligation of the state prisoner to an obligation of the state courts. The Ninth Circuit's transformation finds no support in the Court's case law; neither does the transformation Reese now urges. If all that matters for fair presentation is what the state courts did (or could have done) in analyzing a claim, a state prisoner could exhaust a federal claim in state court by relying exclusively on the state constitution as the only basis for relief. Even the Ninth Circuit has refused to expand the fair presentation requirement that far. *Peterson v. Lampert*, 319 F.3d 1153, 1159 (9th Cir. 2003) (en banc).

The third problem for Reese is that his first two options for meeting the fair presentation requirement are inconsistent. If, as he asserts, the state courts use the federal analysis whether appellate counsel's performance is challenged under the state or federal constitution or both, it is unlikely that the

state courts would use a distinct term ("inadequate") to refer to assistance of counsel claims under the state constitution. The only reason for the Oregon Supreme Court to suggest a preference for a different term under the state constitution is because the state appellate courts treat the state and federal claims as distinct and independent claims.

Moreover, if the Court accepts Reese's argument that the state courts use the same test for both state and federal claims, the Court must reject Reese's primary argument that, simply by reading the post-conviction trial court's memorandum opinion, the state appellate courts would necessarily have known that Reese's appeal involved a federal claim. The post-conviction trial court's citation to a federal case would not necessarily mean that the court decided a federal question. The court could just as easily have been resolving only the state constitutional issue or both the state and federal issues and the citation to a federal case could never alert the state appellate courts that Reese was pursuing only his federal constitutional claim on appeal.

III. Oregon courts—like most appellate courts—address only the claims that litigants present to them. Nothing in Oregon law required the state appellate courts to address an issue that Reese did not raise clearly as a claim of error.

Reese argues that certain procedural aspects of Oregon law governing post-conviction trial court decisions and summary affirmance in the Oregon Court of Appeals necessarily mean that the state appellate courts were alerted to the federal source of Reese's claim. Brief of Respondent at 35–39. The State touched on this argument in its opening brief. Brief of Petitioner at 29–30 n. 13. A few additional comments are warranted in response to Reese's argument. First, the summary affirmance statute does not alter the general requirement that appellants properly must present issues they want the appel-

late court to consider. Although Or. Rev. Stat. § 138.660 permits the Oregon Court of Appeals to summarily affirm, it focuses on whether any "substantial question of law is *presented by the appeal*." (Emphasis added). The Oregon Court of Appeals does not consider the merits of an issue never presented properly in the appeal. Nor does the fact that the decision to summarily affirm is described as "a decision upon the merits of the appeal," Or. Rev. Stat. § 138.660, change the basic appellate requirements for raising claims. Instead, in enacting that provision, the legislature merely confirmed that the losing party could petition for review by the Oregon Supreme Court on the merits of the appeal instead of simply on the decision to summarily affirm. The statute does not transform the intermediate appellate court's decision into one that encompasses issues that no party ever properly raised.

Nor is it necessary, as Reese asserts, for the Oregon Supreme Court to examine the merits of the post-conviction trial court judgment in order to address the petition for review. To the contrary, that court may deny a petition for review when it identifies, simply by examining the petition for review itself, no colorable issues for the court to address. A petition seeking review of an order of summary affirmance is no different in this regard than a petition from an unwritten decision of the Oregon Court of Appeals. Certainly, Reese offers nothing to support his assertion that the Oregon Supreme Court must have looked through the Oregon Court of Appeals' decision and back to the memorandum opinion of the post-conviction trial court when it denied his petition for review.

The only support Reese offers for this argument is based on his apparent misunderstanding of the requirements for preserving error. Brief of Respondent at 39–40. Preservation requirements are distinct from the party's obligation to properly frame an issue for appellate court review. State appellate courts have consistently refused to address inadequately pre-

sented claims on appeal, even when those claims were adequately preserved in the trial court. *See* Brief of Petitioner at 28–31.

IV. The State has not abandoned its concern that the factual basis for Reese's inadequate assistance of counsel claim has changed throughout the various proceedings.

Throughout his brief, Reese presumes that he raised or attempted to raise only a single ineffective-appellate-counsel claim in the state post-conviction and federal habeas corpus proceedings.[4] When the factual allegations shift during the proceedings from multiple factual complaints to undefined allegations to newly raised factual issues, an ineffective-appellate-counsel claim cannot be treated as a single claim.

In the amended petition Reese's counsel filed with the post-conviction trial court, he claimed his appellate counsel on the direct appeal was ineffective for: (1) failing to withdraw as Reese's attorney due to conflict of interest; (2) failing to notify Reese of change of counsel for his case; (3) failing to

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[4] *See, e.g.*, Brief for Respondent at 4 ("Counsel filed a first amended formal PCR petition raising the claim of ineffective assistance of appellate counsel * * *."); 5 (Reese's PCR brief in the Oregon Court of Appeals "did not explicitly cite to federal authority for the ineffective assistance of appellate counsel claim * * *."); 7 (discussing the Magistrate Judge's ruling that Reese "had fairly presented his claim of ineffective assistance of appellate counsel."); 12 (Reese "raised his federal constitutional claim of ineffective assistance of appellate counsel in a petition for post-conviction relief" and "fairly presented the substance of his ineffective assistance claim" in the State appellate courts); 14 (Reese "raised every claim he had made in the Oregon Court of Appeals before the Oregon Supreme Court, including the claim of ineffective assistance of appellate counsel.").

raise unspecified issues that had been preserved for appeal; (4) failing to file a timely notice of appeal; and (5) failing to obtain trial transcripts in a timely manner. J.A. 17. The post-conviction trial court's ruling ("Appellate counsel need not present every colorable issue.") apparently addressed only the third claim. J.A. 23.

In the post-conviction appeal to the Oregon Court of Appeals, Reese pursued the fourth claim (attorney failed to file a timely petition for review in the Oregon Supreme Court), and the third claim (attorney failed to raise issues), still without specifying the issues that Reese thought counsel should have raised ("Barton did fail to raise issues on appeal."). J.A. 32. In his petition for review of the post-conviction decision in the Oregon Supreme Court, Reese simply alleged "inadequate assistance of appellate counsel." J.A. 47–48.

In his federal habeas corpus petition, Reese alleged four ineffective-appellate-counsel claims for failing to raise any issues, failing to raise two still-unidentified legal issues, failing to withdraw, and failing to exhaust state remedies by refusing to file a petition for review in the Oregon Supreme Court. *See* Supp. App. to Pet. for Cert. 5. The claim Reese most vigorously pursued—and the centerpiece of this case in the district court—was that his appellate counsel was ineffective for filing a *Balfour* brief and for not identifying any meritorious issues to raise in the direct appeal. Thus, for the first time in the process, the case became focused on a claim that appellate counsel provided ineffective assistance by complying with the *Balfour* process. *See* Supp. App. to Pet. for Cert. 13–18.

To demonstrate that he exhausted his available state-court remedies, Reese must show that he raised—at each level of the state courts—the specific claim he now wants to pursue in federal habeas corpus: that his appellate counsel on direct appeal was ineffective under the federal constitution because he

filed a *Balfour* brief. It is not enough for a state prisoner to argue in the state courts that his appellate counsel was ineffective for failing to file a petition for review and then to argue in federal habeas corpus that his counsel was ineffective for failing to raise a particular issue. Although the State has focused on Reese's failure to identify a federal source for his specific claim, the state has not, as Reese argues, abandoned all objections to the inadequate presentation of the factual basis of his inadequate assistance of appellate counsel claim. See Brief of Respondent at 42–43. To determine whether Reese properly alerted the state appellate courts to the federal nature of his claim, the Court must first focus on the precise boundaries of that claim.

V. Some additional points warrant a brief response.

First, Reese inaccurately describes the Oregon Supreme Court's review of issues not raised in a petition for review. Brief of Respondent at 40 and n. 25. Although the Ninth Circuit has stated that the Oregon Supreme Court "retains the power to address claims which are not raised in the petition for review," *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994), the state court, in fact, applies that practice to cases in which it has allowed review and the court deems it necessary to address an issue in order to reach the issues properly presented to the court. *See* Oregon Rule of Appellate Procedure 9.20(2);[5] *Stupek v. Wyle Laboratories Corp.*, 327 Or. 433,

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[5] Oregon Rule of Appellate Procedure 9.20(2) provides:

> If the Supreme Court allows a petition for review, the court may limit the questions on review. If review is not so limited, the questions before the Supreme Court include all questions properly before the Court of Appeals that the petition or the response claims were erroneously decided by that court. The Supreme Court's opinion need not ad-

437, 963 P.2d 678, 680 (1998) (under Oregon Rule of Appellate Procedure 9.20(2), court may consider issue not presented on review, that was properly raised on appeal and preserved below, but court "ordinarily will not do so unless the issue requires resolution"); *State v. Castrejon*, 317 Or. 202, 211–212, 856 P.2d 616, 622 (1993) (explaining scope of court's discretion under the rule); *see also* Oregon Rule of Appellate Procedure 9.17(2)(b)(i) (prohibiting a party from addressing issues not raised in the petition for review itself or changing the substance of the questions presented in a petition for review).[6]

Second, Reese asserts that, in a subsequent case, the Ninth Circuit has narrowed the holding in this case. Brief of Respondent at 41–42. To the extent that it matters to the Court's consideration, the Ninth Circuit continues to reach inconsistent results in this area by speculating on what the state appellate courts might have done when presented with an incomplete or inadequate claim of error. *See Lounsbury v. Thompson*, ___ F.3d ___, ___ (9th Cir. 2003) (WL 21993253) (a state

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dress each such question. The court may consider other issues that were before the Court of Appeals.

[6] Oregon Rule of Appellate Procedure 9.17(2)(b)(i) provides:

> (b) The brief on the merits of the petitioner on review shall contain:
>
> (i) Concise statements of the legal question or questions presented on review and of the rule of law that petitioner proposes be established. The questions should not be argumentative or repetitious. The phrasing of the questions need not be identical with any statement of questions presented in the petition for review, but the brief may not raise additional questions or change the substance of the questions already presented.

prisoner fairly presents to the state court a substantive claim that he was incompetent to proceed to trial when he limits his state court appeal to solely a procedural competency challenge because the state appellate court would probably have examined the substantive claim to determine whether the alleged procedural defect was harmful).

Finally, Reese argues that the Court should not attempt to clarify the rule for proper exhaustion even though Reese agrees the issue is complex and there is disagreement between and within the federal appellate courts. Reese asserts that clarifying the requirements will only add to the complexity. Brief of Respondent at 46–50. Contrary to Reese's assertion, the State emphasizes that it is not asking the Court to announce a new rule for fair presentation of claims in state courts. Instead, the State urges the Court to clarify in plain terms what it has said before: it is the obligation of state prisoners to fairly present their federal claims in state court by giving the state court a fair opportunity to consider and resolve those federal claims. The State is confident that, instead of adding to the complexity and confusion, the Court can simplify the requirements for "fair presentation" consistent with the purpose underlying that requirement. In doing so, the Court will benefit state prisoners by minimizing the traps for the unwary. And it will reduce the costs incurred by the States and the federal courts in repeatedly litigating the question of procedural default.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Petition for Certiorari and in the Brief of Petitioner, the Court should reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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